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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

DOUG LITTLE - Chairman
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Arizona Corporation Commission

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In the matter of:

BART J. ELLIS and COLLEEN ELLIS, husband
and wife,

OAK CAPITAL PARTNERS, LLC, an Arizona
limited liability company,

Respondents.

DOCKET NO. S-20949A-16-0002

**SECURITIES DIVISION'S POST-
HEARING BRIEF**

Hearing Date: September 12, 2016

**Assigned to Administrative Law
Judge Mark Preny**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its Post-Hearing Brief ("Brief") with respect to the administrative hearing held on September 12, 2016. This Brief is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

When Bart Ellis was terminated from his position as a broker/financial adviser at Ameriprise Financial Services, Inc. in October 2012, he quickly moved on to taking former clients' money through illegal conduct. He formed an Arizona limited liability company, Oak Capital Partners, LLC, of which he was the sole member and manager. Then he lied to several of his former clients, telling them that he was either setting out to form his own business, or that Oak Capital was an already-established firm, or that he was jointly working at another large firm and Oak Capital. Four former clients believed Ellis's stories and transferred \$1,122,500 of their investment funds to Ellis and Oak Capital with the understanding that Ellis would continue to provide brokerage and investment advisory services. Neither Ellis nor Oak Capital was licensed or registered to provide

1 these services. But they took the clients' money and, from October 2012 through 2015, Ellis and
2 Oak Capital spent almost half of the funds on day-trading activities which resulted in a complete
3 loss of these funds; the other half they spent mostly on personal expenses.

4 These facts and allegations were described in detail in the January 8, 2016 Notice of
5 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution,
6 Order for Administrative Penalties, and Order for other Affirmative Action (the "Notice") that the
7 Division filed against the Respondents. The Notice specifically included allegations that Ellis and
8 Oak Capital violated the registration and fraud provisions of both the Securities Act of Arizona and
9 the Arizona Investment Management Act.

10 Bart Ellis requested a hearing. Oak Capital did not. Both Ellis and Oak Capital failed to file
11 an answer to the Notice. Under Commission Rule of Procedure R14-4-305(D), these respondents
12 have admitted to the allegations against them. Although Ellis's and Oak Capital's failure to file an
13 answer establishes the facts and allegations against them, as shown in this brief, those facts and
14 allegations were also established by the evidence at hearing and are consistent with established law.
15 Consequently, Ellis and Oak Capital are obligated to pay restitution under A.R.S. §§ 44-2032 and
16 44-3292 and to pay administrative penalties under §44-2036 and 44-3296.

17 Ellis's obligation is an obligation of his marital community. Under A.R.S. §§ 25-214 and 25-
18 215, either spouse in a marriage may create liabilities for the marital community. It is presumed that
19 any obligations incurred are marital community obligations. The person rebutting this presumption
20 had the burden of doing so with clear and convincing evidence. Here, Bart Ellis's spouse, Colleen
21 Ellis ("Respondent Spouse"), was joined in this matter under A.R.S. §§ 44-2031(C) and 44-3291(C)
22 solely for purposes of determining the obligation of the marital community. Respondent Spouse
23 failed to present any evidence rebutting the presumption that Ellis's actions did not benefit the
24 marital community. In fact, though it had no obligation to do so, the Division presented evidence
25 that Ellis used investor funds to pay the rent of the home where Respondent Spouse resided.
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1 **II. Parties and Jurisdiction**

2 Respondent Bart J. Ellis is a married man who resided in Arizona from October 2012, through
3 at least April 2015.¹

4 Respondent Spouse was at all relevant times the spouse of Bart Ellis.²

5 Respondent Oak Capital is a manager-managed, Arizona limited liability company. Ellis formed
6 Oak Capital on October 22, 2012. Ellis is Oak Capital's sole listed member, its manager, its statutory
7 agent, and its organizer. In Oak Capital's articles of organization, Oak Capital and Ellis list a Paradise
8 Valley, Arizona residence its place of business and Ellis's address.³

9 The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona
10 Constitution, the Securities Act, and the Arizona Investment Management Act.⁴

11 **III. Facts**

12 From approximately January 2001 to October 2012, Ellis was a securities salesman and an
13 investment adviser representative located in Illinois.⁵

14 From October 2009 through October 2012, Ellis worked for Ameriprise Financial Services,
15 Inc.⁶ During this timeframe, Ellis was registered as a securities salesman in both Illinois and Arizona,
16 and was a licensed investment adviser representative in Illinois.⁷ Ellis's clients paid Ameriprise to
17 receive financial advice from Ellis and Ellis received compensation from Ameriprise.⁸

18 On March 3, 2012, Ellis filed for bankruptcy in Illinois.⁹ The liabilities that Ellis listed in his
19 bankruptcy included \$31,833 of credit card debt and a \$215,000 judgment from Morgan Stanley.¹⁰

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22 ¹ Hearing Transcript ("Hr. Tr.") p. 20; Answer of Colleen Ellis at p. 1.

23 ² Hr. Tr. p. 20; Answer of Colleen Ellis at p. 1.

24 ³ Ex. S-12.

25 ⁴ A.R.S. §§ 44-1822, 44-1842, 44-1991, 44-3132, 44-3151, and 44-3241; Colleen Ellis Answer p. 1.

26 ⁵ Hr. Tr. pp. 22-25; Ex. S-5; Ex. S-6 Schedule I; Ex. S-24 at ACC000413.

⁶ Hr. Tr. pp. 22-23; Exs. S-5, S-7, S-10 and S-11,

⁷ Ex. S-5 at p. 3.

⁸ Hr. Tr. p. 134-135; Ex. S-6 Schedule I (p. 8 of 11).

⁹ Hr. Tr., p. 21; Ex. S-6.

¹⁰ Ex. S-6 Schedule F.

1 On October 8, 2012, Ameriprise terminated Ellis for violating company policy.¹¹
2 Subsequently, Ellis did not associate with a licensed investment adviser or registered securities
3 dealer.¹²

4 By the end of October 2012, Ellis had moved to Arizona and formed Oak Capital.¹³

5 Upon moving to Arizona, Ellis and Respondent Spouse first lived in a residence in Paradise
6 Valley.¹⁴ In March 2013, they moved to a rental home in Scottsdale.¹⁵ Respondent Spouse is listed as
7 the tenant on the lease for the Scottsdale property.¹⁶ From March 2013 through May 2015, Bart Ellis
8 paid the rent on this property from Oak Capital's business account.¹⁷ Bart Ellis was also located at this
9 residence when the Division served him with subpoenas (Ellis initially lied about his identity, but later
10 responded to the subpoenas; in his response, he also lied saying that Oak Capital had no activities).¹⁸

11 After moving to Arizona and forming Oak Capital, Ellis and Oak Capital did not register as
12 securities salesmen or dealers and did not obtain licenses as investment advisers or investment adviser
13 representatives with the Commission.¹⁹

14 In a business charter signed by Ellis, Ellis describes Oak Capital's business as that of a broker
15 or investment adviser:

- 16 • Oak Capital is an "investment/trading operation specializing in Futures, Options of
17 Futures and Equity Option Trading."
 - 18 • Oak Capital's business is to manage a portfolio that includes these assets.
 - 19 • Oak Capital's goal is "achieving 15% per year."
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23 ¹¹ Ex. S-5 at p. 3.

¹² Ex. S-5 at pp. 3 and 8.

24 ¹³ Hr. Tr. at p. 20; Ex. S-12.

¹⁴ Hr. Tr. at p. 20; Ex. S-12

¹⁵ Hr. Tr. at 20; Ex. S-30 pp. ACC003888 and ACC003890.

25 ¹⁶ *Id.*

¹⁷ Ex. S-30 at ACC003888; Ex. S-25.

26 ¹⁸ Hr. Tr. pp. 28–31; Ex. S-4.

¹⁹ Exs. S-1 and S-2; Ex. S-5.

- 1 • Because of what he learned about hedging portfolios from market risk in 15 years of
- 2 working with clients and trading, Ellis has gained “a unique edge through 15 years in the
- 3 fields of Futures and Options.”
- 4 • Based on his trading experience, “Ellis found the need to form a trading group [i.e. Oak
- 5 Capital] to profit from his unique buisness [*sic*] background.”
- 6 • Oak Capital’s manager (Ellis) will make a monthly withdrawal “in order to maintain
- 7 operating [*sic*] cost of business, this cost will come from positive cash flow only.”²⁰

8 Ellis and Oak Capital performed several of the functions described in this charter—including
9 investing and trading securities—using the funds of four clients (collectively, the “Clients”).

10 The first of the Clients, Illinois resident Barbara Miller, was a client of Ameriprise where
11 Ellis provided brokerage and investment advisory services to Miller.²¹ These included giving Miller
12 a “Financial Plan Proposal” that dealt with the management of her financial assets and portfolio;
13 selecting the investment assets in Miller’s portfolio; and executing purchases and sales of investment
14 assets.²² Miller paid Ameriprise a fee for Ellis’s services.²³ Ellis performed these services for Miller
15 until Ameriprise terminated his employment.²⁴

16 Ellis did not tell Miller that Ameriprise had fired him or that he was no longer licensed to
17 broker securities transactions. Instead, in approximately October 2012, Ellis informed Miller that he
18 was leaving Ameriprise and would be working through Merrill Lynch and Oak Capital.²⁵

19 Ellis advised Miller to sell her existing investments—including stocks, equities, and other
20 securities—and transfer the sale proceeds to Merrill Lynch and to Oak Capital.²⁶ Ellis informed Miller
21 that he would invest her funds in certificates of deposit.²⁷

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23 ²⁰ Ex. S-24 at ACC000413.

24 ²¹ Exs. S-7, S-8(f), S-8(g), S-8(h); Hr. Tr. at 134–35.

²² Ex. S-7 at ACC003962–92; Hr. Tr. at 134–35.

²³ Hr. Tr. at 135.

25 ²⁴ *Id.*; see also Exs. S-7, S-8(f), S-8(g), S-8(h).

²⁵ Hr. Tr. at 136–37 and 139–40; Ex. S-9.

26 ²⁶ Hr. Tr. at 142; Exs. S-8(c), (d) and (e); Exs. S-25 and S-27.

27 ²⁷ Hr. Tr. at 139–141.

1 Based on Ellis's representations and advice, from November 2012 through April 2014, Miller
2 sold her investment assets including stocks and other securities.²⁸ From the proceeds of these sales,
3 Miller wrote eight checks and made two wire transfers to Oak Capital totaling \$905,000.²⁹ Ellis
4 deposited all checks in, and both wire transfers went to, Oak Capital's bank accounts.³⁰ Ellis
5 transferred significant portions of Miller's funds to an Interactive Brokers trading account.³¹

6 Around March 2014, Miller requested that Ellis send her documents showing her
7 investments.³² In response, several weeks later Ellis mailed Miller a document titled "Investment
8 Report" for the month of March 2014.³³ He later mailed Miller reports for May 2014 and October
9 2014.³⁴

10 All three reports were on stationary labeled "Oak Capital, LLC." The reports listed Ellis as
11 "Your financial advisor." Each report showed that Miller's assets under Oak Capital management
12 had increased in value during the given month.³⁵ Each report included a list of financial assets
13 supposedly held in the account, including HSBC notes earning set interest rates.³⁶ The October report
14 showed that Miller's account included stock in publicly-traded corporations like Intel and Tesla
15 Motors; the report showed that total value of this stock was \$320,360.³⁷ Bank records and Interactive
16 Brokers statements show, however, that none of Miller's money went to purchasing these assets.³⁸

17 The second of Ellis and Oak Capital's four Clients is Steve Stone. Stone resides in Arizona,
18 where he met Ellis through a group of friends.³⁹ Ellis was Stone's investment adviser from 2010
19 through 2012, while Ellis worked at Ameriprise.⁴⁰ After Ellis moved to Arizona in 2012, Stone
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21 ²⁸ Exs. S-7, S-8(b), S-8(c).

22 ²⁹ Exs. S-25 and S-28.

23 ³⁰ Exs. S-25 and S-28.

24 ³¹ Exs. S-15, S-24, S-25, S-27 and S-31.

25 ³² Ex. S-9 at ACC003914-15.

26 ³³ Ex. S-9 at ACC003901-4.

³⁴ Ex. S-9 at ACC003905-12.

³⁵ Ex. S-9 at ACC003901-12.

³⁶ *Id.*

³⁷ Ex. S-9 at ACC3909-12.

³⁸ Exs. S-25, S-27, and S-31.

³⁹ Hr. Tr. at 57-58.

⁴⁰ *Id.*

1 invested \$27,500 with Oak Capital on February 19, 2014.⁴¹ This money was to be invested in stocks;
2 Stone did not expect his funds to be used for day-trading or for Ellis's salary.⁴² On March 14, 2014,
3 Oak Capital paid Stone a \$6,149 check as a return on his investment. On May 4, 2014, Oak Capital
4 paid Stone an additional \$17,500.⁴³ The funds for these payments came from Client funds.⁴⁴

5 Ruth Richter is a now-deceased elderly woman who resided in Illinois. Ellis was Richter's
6 investment adviser for several years while Ellis worked for Ameriprise.⁴⁵ After Ameriprise fired Ellis
7 and Ellis moved to Arizona, he and Oak Capital continued to act as Richter's broker and investment
8 adviser.⁴⁶ In January and June 2013, Richter wrote two checks to Oak Capital for \$80,000 and
9 \$40,000 respectively. Ellis deposited both checks into Oak Capital's account at a Scottsdale branch
10 of FirstBank.⁴⁷ Like Barbara Miller, Ellis told Richter that her funds would be used to purchase
11 certificates of deposit.⁴⁸

12 Thomas Gelhar is a now-deceased elderly man from Wisconsin. Ellis was Gelhar's
13 investment adviser for several years while Ellis worked for Ameriprise.⁴⁹ After Ameriprise fired
14 Ellis, Ellis and Oak Capital continued to act as Gelhar's broker and investment adviser.⁵⁰ Gelhar
15 wrote a \$70,000 check to Oak Capital which Ellis deposited in a Scottsdale Branch of FirstBank on
16 March 1, 2013.⁵¹ Ellis transferred a portion of Gelhar's funds to the Interactive Brokers account
17 where it was used to purchase securities.⁵²

18 Ellis and Oak Capital banked at FirstBank and Wells Fargo. Ellis opened Oak Capital's
19 business account and a personal account at FirstBank on October 31, 2012, at a branch in Scottsdale.
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21 ⁴¹ Exs. S-15 at ACC000234 and 246; S-28.

22 ⁴² Hr. Tr. at 57-58.

23 ⁴³ *Id.*

24 ⁴⁴ Ex. S-28

25 ⁴⁵ Hr. Tr. pp. 52-55; Exs. S-8(f), S-10 and S-11.

26 ⁴⁶ *Id.*

⁴⁷ Ex. S-15 at ACC000167 and 192; Ex. S-28

⁴⁸ Ex. S-11;

⁴⁹ Hr. Tr. at 48-49. Exs. S-8(f) and S-8(g).

⁵⁰ *Id.*

⁵¹ Ex. S-28.

⁵² Exs. S-25, S-28, S-29 and S-31.

1 Ellis was the only signatory on the accounts. Ellis used the Paradise Valley address as his home
2 address in the account registration forms.⁵³

3 In summer 2014, FirstBank required Ellis to close his and Oak Capital's accounts.⁵⁴ On July
4 29, 2014, Ellis withdrew the remaining \$127,996.05 balance in Oak Capital's FirstBank account with
5 a cashier's check.⁵⁵

6 On August 11, 2014, Ellis opened a business bank account for Oak Capital at Wells Fargo's
7 Gainey Ranch location in Scottsdale. Ellis is the sole signor of the account. In the account application,
8 Ellis stated that Oak Capital's address was in Paradise Valley and that Ellis's address was the address
9 of the Scottsdale home where Ellis's family resided and where he was paying rent. In the account
10 application, Ellis described Oak Capital as being a "Capital Advisor Group" in the "Finance and
11 Insurance" industry with annual revenue of \$500,000.⁵⁶ Ellis deposited the \$127,996.05 FirstBank
12 cashier's check to open the Wells Fargo account.⁵⁷

13 From the October 2012 through March 2015, Ellis deposited a total of \$1,127,146 into Oak
14 Capital's FirstBank and Wells Fargo accounts. All but \$4,646 of the deposits came from the Clients
15 described above.⁵⁸ A review of Oak Capital's and Ellis's bank accounts shows that Ellis and Oak
16 Capital did not use the Client funds to purchase certificates of deposit or other conservative
17 investments.

18 About half of the deposits from Oak Capital's bank account to a trading account with
19 Interactive Brokers⁵⁹ where Ellis eventually lost funds in trading activities and fees.⁶⁰
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23 ⁵³ Exs. S-14 – S-18, Ex. S-25.

24 ⁵⁴ Ex. S-14 at ACC000155.

25 ⁵⁵ Ex. S-15 at ACC000256.

26 ⁵⁶ Ex. S-19.

⁵⁷ Ex. S-20 at ACC002672 and 2723.

⁵⁸ Ex. S-25.

⁵⁹ Exs. S-25 and S-28.

⁶⁰ Exs. S-28 and S-31.

1 Ellis opened the Interactive Brokers account for Oak Capital in November 2012. Ellis was the
2 sole person authorized to use the account. The account was authorized to trade in stocks, options,
3 warrants, Forex, futures and futures options.⁶¹

4 Oak Capital transferred a net of \$567,916 from its bank accounts into its Interactive Brokers
5 accounts.⁶² Over 28 months of purchasing and selling assets that included stocks, mutual funds,
6 futures and other securities, Oak Capital experienced gains from trading in only five months.⁶³ These
7 gains totaled \$54,145. In the other 23 months, Ellis and Oak Capital lost a total of \$538,239 from
8 their trading activities.⁶⁴ They also paid \$78,341 in fees and other expenses. By February 28, 2015,
9 the value of the account's assets was \$9,679.82.⁶⁵

10 Ellis and Oak Capital did not disclose to the Clients that Client funds were being used for
11 day-trading activities, much less the enormous monthly losses resulting from this trading.⁶⁶

12 Respondents spent the other half of the Clients' funds on items not related to any investments,
13 primarily on Ellis's personal expenses.⁶⁷ These expenses include the following:

- 14 • \$57,104 in rent, including \$49,900 to Becky Youman, the landlord of the house
15 Respondent Spouse was leasing
- 16 • \$46,300 on retail purchases
- 17 • Credit card payments totaling \$36,126, including \$10,477 to Colleen Ellis accounts
- 18 • \$32,534 on Automobiles and repairs, including a January 30, 2014 check, signed by Ellis,
19 to "Earnhart + Scottsdale Lexus" for \$24,747.24
- 20 • \$9,068 on medical expenses, including a February 24, 2014, \$4,992 payment to the Shaw
21 Center for Aesthetic Enhancement, a plastic surgery center in Scottsdale, Arizona

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24 ⁶¹ Ex. S-24.

⁶² Exs. S-25, S-27, and S-31.

⁶³ Exs. S-27 and S-31.

25 ⁶⁴ *Id.*

⁶⁵ *Id.*

26 ⁶⁶ Hr. Tr. at 58–59 and 143–45; Ex. S-9.

⁶⁷ Exs. S-25 and S-26

- \$19,723 on travel and entertainment and another \$9,068 on lodging, including an April 19, 2014 check for \$8,014.64 signed by Ellis to “A Vacation by the Bay,” a San Diego vacation property rental company
- A May 4, 2014, \$17,500 check signed by Ellis to Stone
- \$80,244 in cash withdrawals
- Utilities bills totaling \$19,723
- \$56,708 transferred to Ellis’s personal account⁶⁸

Significantly, none of Ellis’s and Oak Capital’s bank statements or other financial documents showed any purchases of certificates of deposits.

IV. Legal Argument

The Division established at hearing that during the years 2012–2015, respondents Ellis and Oak Capital repeatedly violated both the registration and licensure requirements of A.R.S. §§ 44-1842 and 44-3151 and the anti-fraud provisions of A.R.S. § 44-1991 and 44-3241.

A. Ellis and Oak Capital violated the licensure requirements of the Investment Management Act by receiving compensation when engaging in the business of providing securities advice.

Bart Ellis’s and Oak Capital’s were investment advisers and Ellis was an also an investment adviser representative under the Investment Management Act. Consequently, they were required to be licensed by the Commission.

The Investment Management Act defines an investment adviser as any person who, for compensation, engages in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing or selling securities.⁶⁹ The definition of investment adviser includes “financial planners who, as an integral component of other financially related services,

⁶⁸ *Id.*

⁶⁹ A.R.S. § 44-3101(5).

1 provide...[or]...hold themselves out as providing the foregoing investment advisory services to
2 others for compensation.”⁷⁰

3 The definition of investment adviser in the Investment Management Act is virtually identical
4 to the definition of an investment adviser in the Federal Investment Advisers Act of 1940.⁷¹ Cases
5 interpreting the federal provisions are persuasive in interpreting provisions in the Arizona Act.⁷²
6 These cases provide guidance as to what satisfies the elements of providing securities advice, “being
7 in the business” of doing so, and receiving compensation.

8 When determining whether a person is the business of providing securities advice, federal
9 courts have adopted portions of an SEC interpretive release.⁷³ These opinions and the SEC guidance
10 establish that one way to be “in the business” of providing investment advice is to hold oneself out
11 as an investment adviser.⁷⁴

12 Here, Ellis was a registered investment adviser representative while at Ameriprise, where he
13 was listed as a “financial advisor” to the Clients.⁷⁵ When explaining to the Clients why he left
14 Ameriprise, he informed Clients that he would be providing the same services in essentially the same
15 position at Oak Capital or Merrill Lynch.⁷⁶ Thus, he held himself and Oak Capital out as financial
16 advisers, satisfying the element that he “be in the business” of providing investment advice.

17 A second way that Ellis and Oak Capital were in the business of giving investment advice is
18 that they selected investment advisers for the Clients.⁷⁷ Ellis referred three of the Clients (Miller,
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21 ⁷⁰ *Id.*

22 ⁷¹ 15 U.S.C. § 80b-2(a)(11).

23 ⁷² *Eastern Vanguard Forex v. Arizona Corp. Com’n*, 206 Ariz. 399, 410, ¶36, 79 P.3d 86, 97 (Ct. App. 2003). *Nutek Infor. Sys.*, 194 Ariz. 104, 108, ¶ 16, 977 P.2d 826, 830 (Ct. App. 1998).

24 ⁷³ *United States v. Miller*, 833 F.3d 274 (3rd Cir. 2016); *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1163 (10th Cir. 2011); *United States v. Elliott*, 62 F.3d 1304, 1310, 1311 n.8 (11th Cir. 1995).

25 ⁷⁴ See *Miller*, 833 F.3d at 281, citing SEC Release, 52 Fed. Reg at 38402.

26 ⁷⁵ Ex. S-7 at ACC003962 (“Prepared by: Bart J. Ellis, Financial Advisor”); Ex. S-10 at ACC002817 (Ruth Richter account statement, Ellis is listed as “your financial advisor”); Hr. Tr. at 48–49, 51–52 and 56–58.

⁷⁶ Hr. Tr. at 136–38; Ex. S-9

⁷⁷ *SEC v. Bolla*, 401 F. Supp. 43 (D.D.C. 2005), *aff’d in relevant part*, *SEC v. Washington Investment Network*, 475 F.3d 392 (D.C. Cir. 2007) (person selecting investment advisers for clients meets the Advisers Act’s definition of “investment adviser”).

1 Richter and Gelhar) to Timothy Kiley at Merrill Lynch.⁷⁸ Kiley subsequently shows up as Miller's
2 "financial advisor" on Merrill Lynch statements.⁷⁹

3 A third way that Bart Ellis and Oak Capital were "in the business" of being investment
4 advisers is that they were financial planners to the Clients. The Investment Management Act's
5 definition of an "investment adviser" includes financial planners.⁸⁰ Black's Law Dictionary defines
6 "financial planner" as "A person whose business is advising clients about personal finances and
7 investments."⁸¹

8 Barbara Miller testified that these are the services that Ellis performed for her at Ameriprise,
9 where Ellis was a licensed investment adviser representative.⁸² This is corroborated by the "Financial
10 Plan Proposal" Ellis gave to Miller. As the name of the document implies, this "Financial Plan" gives
11 detailed advice as to the composition of an investment portfolio that would be managed by Bart Ellis,
12 who is listed as Miller's "Financial Advisor" in the plan.⁸³ Miller testified that she expected Ellis to
13 perform the same services for her after he left Ameriprise.⁸⁴ Ellis describes himself as "Your
14 Financial Advisor" in two "Investment Reports" that he gave to Miller about her supposed portfolio
15 under Oak Capital's management.⁸⁵ Thus, by his own admission, Ellis was a financial planner and
16 an investment adviser to Miller.

17 He was also likely performing the same services for the other Clients. Mr. Brokaw testified
18 that Richter and Stone expected Ellis and Oak Capital to perform the same functions as Ellis did at
19 Ameriprise.⁸⁶ Emails from Ellis to Merrill Lynch shows that Gelhar and Richter were clients of
20 Ellis's and that Ellis referred them to Merrill Lynch.⁸⁷ Both Gelhar and Richter subsequently invested
21 in Oak Capital where their funds were pooled with those of other investors' funds and managed by

22 ⁷⁸ Hr. Tr. at 138; Exs. S-8(f) and S-8(g).

23 ⁷⁹ Ex. S-8(c).

24 ⁸⁰ *Id.*

25 ⁸¹ BLACK'S LAW DICTIONARY 663 (8th ed. 2004).

26 ⁸² Hr. Tr. at 134-35; Ex. S-5.

⁸³ Ex. S-7 at ACC003962; Ex. S-8 at ACC004722 (showing Ellis as Miller's contact at Ameriprise).

⁸⁴ Hr. Tr. at 138-39.

⁸⁵ Ex. S-9 at ACC003906 and 3909.

⁸⁶ Hr. Tr. at 49, 52-53, 57-58.

⁸⁷ Exs. S-8(f) and (g).

1 Ellis. Thus, the evidence at hearing shows that the Clients used Ellis as a financial planner while he
2 was at Ameriprise and that they expected him to perform the same functions at Oak Capital.

3 Finally, because Oak Capital was an investment adviser, Ellis meets the definition of an
4 “investment adviser representative”: an officer of an investment adviser who does any of the
5 following: makes any recommendations or otherwise renders advice regarding securities; manages
6 accounts or portfolios of clients; or solicits, offers or negotiates for the sale of or sells investment
7 advisory services.⁸⁸ The evidence at hearing established that Ellis did all three of these things: he
8 recommended that Clients sell their securities and transfer funds to Merrill Lynch and Oak Capital
9 for Ellis to invest,⁸⁹ he managed accounts and portfolios (including the Interactive Brokers account),
10 and he solicited the Clients to come to Oak Capital. Thus, he needed to be registered as an investment
11 adviser representative.

12 Ellis and Oak Capital’s advice to clients involved securities. The Securities Act defines a
13 “security” to include stocks, bonds, commodity investment contracts, and commodity options⁹⁰
14 (which include forward and futures contracts).⁹¹ Ellis told at least two clients, Miller and Richter, to
15 move their investment assets to Merrill Lynch and Oak Capital.⁹² As shown in the account
16 statements, these assets included securities in the forms of stocks, futures, and mutual funds.⁹³ Telling
17 Clients to move these securities satisfies the requirement that an investment adviser’s business
18 involve giving advice.

19 Ellis and Oak Capital also satisfied the requirement that they give securities advice by using
20 investor funds to buy and sell securities in the Interactive Brokers trading platform.⁹⁴ Managing
21 trades and selecting assets for investment constitutes giving advice,⁹⁵ as does simply having an
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23 ⁸⁸ A.R.S. § 44-3101(6).

24 ⁸⁹ Hr. Tr. at 140–43; Exs. S-8(f) and S-8(g); Ex. S-11.

⁹⁰ A.R.S. § 44-1801(26).

25 ⁹¹ A.R.S. § 44-1801(3), (6) and (7).

⁹² Hr. Tr. at 140 – 43; Exs. S-8(f) and S-8(g); Ex. S-11.

⁹³ Exs. S-7, S-8, S-10 and S-11.

26 ⁹⁴ Exs. S-29 and S-31.

⁹⁵ *Abrahamson v. Fleschner*, 568 F.2d 862, 871 (2d Cir. 1977).

1 obligation to monitor client investments.⁹⁶ All funds in Oak Capital's Interactive Brokers account
2 came from Client funds.⁹⁷ Account documents show that Ellis had sole control the Interactive
3 Brokers account, that Ellis executed thousands of trades in that account over a 28-month period, and
4 that the trades were for stocks, bonds, mutual funds, and futures.⁹⁸ Thus, Ellis and Oak Capital gave
5 securities advice through their transfers, trades, use and control of Client funds.

6 Ellis and Oak Capital's use of Client funds for personal expenses satisfies the "for
7 compensation" requirement. The SEC Release defines "compensation" to an investment adviser as
8 "any economic benefit, whether in the form of an advisory fee or some other fee relating to the total
9 services rendered, commissions, or some combination of the foregoing."⁹⁹ It is not necessary that an
10 investor "pay a discrete fee specifically earmarked as payment for investment advice."¹⁰⁰ The *Miller*
11 court held that an adviser received compensation via the economic benefit he received when he used
12 clients' principal investment for his own purposes.¹⁰¹ The *Elliott* court also held that a defendant
13 compensated himself by spending investors' funds for his own expenses.¹⁰²

14 Here, Ellis received a significant economic benefit from advising the Clients. In fact, nearly
15 his entire income came from the Clients' principal.¹⁰³ Ellis used nearly half of investor funds to eat
16 at restaurants, pay car expenses, pay for healthcare, go on vacation, pay rent, etc.¹⁰⁴ This personal
17 use of funds satisfies the Investment Management Act's "for compensation" requirement.

18 **B. Ellis and Oak Capital acted as dealers and salesmen under the Securities Act.**

19 The Securities Act prohibits a dealer or salesman from offering to sell any securities unless
20 the dealer or salesman is registered pursuant to Article 9 of the Securities Act.¹⁰⁵ Ellis and Oak
21

22 ⁹⁶ *SEC v. Washington Investment Network*, 475 F.3d 392, 396 (D.C. Cir. 2007).

⁹⁷ Exs. S-25 and S-27.

23 ⁹⁸ Exs. S-27 and S-31.

⁹⁹ *US v. Miller*, 833 F.3d at 282, citing SEC Release, 52 Fed. Reg. at 38403; *Elliott*, 62 F.3d at 1311 n.8; *Thomas*, 631
24 F.3d at 1164.

¹⁰⁰ *Elliott*, 62 F.3d at 1311.

¹⁰¹ *Miller*, 833 F.3d at 282.

25 ¹⁰² 62 F.3d at 1311.

¹⁰³ Exs. S-25 and S-26.

26 ¹⁰⁴ *Id.*

¹⁰⁵ A.R.S. § 44-1842.

1 Capital meet the definition of a “dealer” under A.R.S. § 44-1801(9)(a): a person who directly engages
2 full- or part-time as an agent, broker or principal in the business of offering, buying, selling or
3 otherwise dealing or trading in securities issued by another person. As discussed above, Ellis
4 described Oak Capital’s purpose as to buy, sell, and deal in securities and manage investment
5 portfolios. He told investors he would continue what he did at Ameriprise, which is to continue doing
6 what he had been for most of his professional life.¹⁰⁶ Ellis had no other significant income.¹⁰⁷ Thus
7 Ellis engaged at least part-time in this business. And because he was Oak Capital’s manager and sole
8 member, he was a principal for Oak Capital’s investment/finance business.

9 He also meets the definition of being a broker for the Clients. Since the Securities Act does
10 not define “broker” Arizona courts will look to federal interpretations to interpret identical terms
11 used in the Securities Act.¹⁰⁸ The Federal Securities Exchange Act defines “broker” as one who is
12 “engaged in the business of effecting transactions in securities for the account of others.”¹⁰⁹ In
13 determining whether a particular individual or entity falls within this definition, courts consider
14 whether the individual may be “characterized by ‘a certain regularity of participation in securities
15 transactions at key points in the chain of distribution.’”¹¹⁰

16 Here, Oak Capital and Ellis’s business consisted of managing client investments. This
17 included regular participation in securities transactions by both advising clients to sell their
18 investments or by using Client funds for trading securities. Thus, both Ellis and Oak Capital meet
19 the definition of a dealer under the Securities Act and needed to be registered with the Commission.

20 **C. Ellis violated the anti-fraud provisions of the Securities Act and the Investment**
21 **Management Act.**

22 Ellis and Oak Capital’s use of investor funds to day-trade and for personal expenses, their
23 failure to disclose his termination from Ameriprise, their failure to disclose Ellis’s bankruptcy, and

24 ¹⁰⁶ Ex. S-5.

¹⁰⁷ Exs. S-25 and S-26.

25 ¹⁰⁸ *Eastern Vanguard Forex v. Arizona Corp. Com’n*, 206 Ariz. 399, 410, ¶36, 79 P.3d 86, 97 (Ct. App. 2003); *Nutek*
Infor. Sys., 194 Ariz. 104, 108, ¶ 16, 977 P.2d 826, 830 (Ct. App. 1998).

26 ¹⁰⁹ 15 U.S.C. § 78c(a)(4)(A).

¹¹⁰ *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

1 the fake account statements they gave to Miller, violate the anti-fraud provisions of the Securities
2 Act and the Investment Management Act.

3 Both statutes make it a fraudulent practice and unlawful for a person to make any untrue
4 statement of material fact, or fail to state any material fact necessary in order to make the statement
5 made, in the light of the circumstances under which it was made.¹¹¹ Under the Investment
6 Management Act, it is also a fraudulent practice to misrepresent any professional qualifications with
7 the intent that the client rely on the misrepresentation.¹¹²

8 Here, Ellis and Oak Capital represented to the Clients that they would continue to manage
9 investments as they had at Ameriprise. Miller and Richter specifically expected their funds to go to
10 certificates of deposit. Stone expected his funds to go to the purchase of stocks and not to day-trading
11 or to Ellis's salary. In fact, as described above, the Clients' funds went to day-trading (where it was
12 subsequently lost) and to Ellis's personal expenses.

13 Ellis and Oak Capital made further misrepresentations to Miller in sending her fake reports
14 about her investments. Each report included a list of financial assets supposedly held in the account,
15 including HSBC notes earning set interest rates.¹¹³ The October report showed that Miller's account
16 included stock in publicly-traded corporations like Intel and Tesla Motors; the report showed that
17 total value of this stock was \$320,360. However, Oak Capital did not own such stock. Bank records
18 show that Ellis either spent Miller's funds on personal expenses or deposited the funds into a trading
19 account with Interactive Brokers that did not include such notes. Oak Capital's assets for that month
20 consisted of \$117,240.91 cash in its Interactive Brokers account¹¹⁴ and \$322.77 cash in its Wells
21 Fargo account.¹¹⁵

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¹¹¹ A.R.S. §§ 44-1991 and 44-3241.

25 ¹¹² A.R.S. § 44-4221.

26 ¹¹³ Ex. S-9.

¹¹⁴ Exs. S-27 and S-31.

¹¹⁵ Ex. S-20.

1 In addition to not using Client funds as represented, Ellis and Oak Capital failed to make at
2 least two disclosures to Clients that were material to assessing Ellis's qualifications to be an
3 investment adviser or to purchase and sell securities.

4 First, as noted above, Ellis and Oak Capital did not inform the Clients that Ameriprise fired
5 Ellis for violating company rules. In fact, they went so far as to tell clients that Ellis was setting out
6 on his own or going to work for another, large brokerage firm.

7 And second, Ellis did not tell investors that on March 7, 2012, Ellis filed for Chapter 13
8 bankruptcy in the Northern District of Illinois Federal Court. Ellis's unsecured liabilities included
9 \$31,833 in credit card debt and a \$215,000 judgment against Ellis.

10 Under the Securities Act and Investment Management Act, this is material information that
11 would have been relevant to a reasonable investor deciding whether to invest with Ellis and Oak
12 Capital.

13 **D. Ellis and Oak Capital are liable for administrative penalties.**

14 The final consideration is the number of violations of the Securities Act and Investment
15 Management Act by Ellis and Oak Capital and the penalty that should be issued. In assessing the
16 administrative penalty, "each violation" carries a penalty. Under A.R.S. § 44-2036, an assessment of an
17 administrative penalty may be assessed "in an amount not to exceed five thousand dollars for each
18 violation." Pursuant to A.R.S. § 44-1842 "It is unlawful for any dealer to *sell* or purchase or *offer to sell*
19 or buy any securities, or for any salesman to sell or offer for sale any securities within or from this state
20 unless the dealer or salesman is registered...." The Securities Act defines "sale" and "offer to sale"
21 broadly: any disposition of a security or any attempt to or offer to dispose of, or any solicitation of an
22 order or offer to buy a security or interest in a security, meets the definitions.¹¹⁶

23 Here, Ellis and Oak Capital solicited each Client to transfer funds to Oak Capital. These funds
24 came from the sales of securities, which were sold on the advice of Ellis and Oak Capital. Oak Capital
25 and Ellis were to act as securities brokers and use the funds to buy securities. These solicitations, offers

26 ¹¹⁶ A.R.S. § 44-1801(15) and (21).

1 and sales resulted in 14 unregistered transactions by unregistered dealers.¹¹⁷ Each transaction involved
2 fraud, resulting in another 14 violations. The penalties for violating the registration provisions and the
3 fraud provisions of the Securities Act are \$5,000 per violation.¹¹⁸ Thus, the Commission could order up
4 to \$140,000 in penalties for Ellis's and Oak Capital's violations of the Securities Act.

5 Ellis's and Oak Capital's actions also constitute violations of the registration and anti-fraud
6 provisions of the Investment Management. Both carry a \$1,000 penalty.¹¹⁹ At the very least, the 14
7 transactions described in the previous paragraphs constitute violations. This results in up to \$28,000 of
8 penalties for Ellis's and Oak Capital's violations of the Investment Management Act. Because trading
9 Client funds constitutes giving investment advice, the court could, in its discretion, determine that the
10 subsequent management and trading activity constitute additional violations of the Investment
11 Management Act, resulting in a far higher penalty.

12 Because of the egregious nature of Ellis's and Oak Capital's activities—essentially stealing
13 money from elderly clients for their own use—the Division recommends that the Court assess at least a
14 \$100,000 penalty against these respondents.

15 **E. Ellis's obligations are a liability of his marital community.**

16 Under Arizona law, the liabilities incurred by Bart Ellis from his violations of the Securities
17 Act and the Investment Management Act are liabilities of the marital community and including
18 Respondent Spouse in the Notice was consistent with Arizona statutes and due process.

19 The Division included Respondent Spouse in the Notice under A.R.S. §§ 44-2031(C) and
20 44-3291(C). These statutes are consistent with A.R.S. § 25-215(D) which states that "spouses shall be
21 sued jointly and the debt or obligation satisfied: first, from the community property, and second, from
22 the separate property of the spouse contracting the debt or obligation." Since each spouse has equal
23 interest in the community property, they may not be denied that interest without due process of
24 law.¹²⁰ A spouse "must be given 'the opportunity to be heard at a meaningful time and in a

25 ¹¹⁷ Ex. S-28.

¹¹⁸ A.R.S. § 44-2036.

26 ¹¹⁹ A.R.S. § 44-3296(A).

¹²⁰ *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Greene*, 195 Ariz. 105, 110, 985 P.2d 590, 595 (Ct. App. 1999).

1 meaningful manner' before she can be deprived of her interest in the community property."¹²¹ Thus,
2 Respondent Spouse was properly added to the Notice so she would have the opportunity to have a
3 hearing determining her community property obligations.

4 Because Respondent Spouse was married to Ellis during the time of his conduct, Ellis's
5 obligations are obligations of his and Respondent Spouse's marital community. During marriage,
6 "the spouses have equal management, control and disposition rights over their community property
7 and have equal power to bind the community."¹²² Either spouse may contract debts and otherwise
8 act for the benefit of the community.¹²³ The debt is incurred at the time of the actions that give rise
9 to the debt.¹²⁴ A debt incurred by a spouse during marriage is presumed to be a community
10 obligation.¹²⁵ A party contesting the community nature of a debt bears the burden of overcoming
11 that presumption by clear and convincing evidence."¹²⁶

12 Here, the evidence at hearing showed that Respondent Spouse was married to Bart Ellis while
13 he engaged in the conduct described in the Notice, which Ellis and Oak Capital admitted to and
14 which was established at hearing. This creates a presumption of community liability. It is
15 Respondent Spouse's burden to overcome the presumption with clear and convincing evidence.
16 Respondent Spouse presented no evidence—rebutting the presumption of community liability or
17 otherwise—at the hearing. And while the Division had no obligation to do so, it presented evidence
18 that Ellis and Respondent Spouse's marital community benefited from Ellis's conduct: Ellis paid the
19 rent for a home that Respondent Spouse was leasing and living in and paid for credit cards in
20 Respondent Spouse's name. Thus, an order of restitution and penalties against Ellis creates a
21 community obligation.

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23 ¹²¹ 195 Ariz. at 110, 985 P.2d at 595.

24 ¹²² A.R.S. § 25-214(B).

25 ¹²³ A.R.S. § 25-215(D).

26 ¹²⁴ *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 806 (Ct. App. 2008).

¹²⁵ *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ct. App. 1995). *See also Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d 705, 712 (1981) ("(T)he presumption of law is, in the absence of the contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community.")

¹²⁶ *Id.*

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1 On this 10th day of November, 2016, the foregoing document was filed with Docket Control as a
2 Securities Division Brief, and copies of the foregoing were mailed on behalf of the Securities
3 Division to the following who have not consented to email service. On this date or as soon as possible
4 thereafter, the Commission's eDocket program will automatically email a link to the foregoing to
5 the following who have consented to email service.

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